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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 838

CAROLINA & NORTHWESTERN RAILWAY COMPANY,
ATLANTIC & EAST CAROLINA RAILWAY COMPANY,
STATE UNIVERSITY RAILROAD COMPANY
and
SOUTHERN RAILWAY COMPANY, - Appellants,

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

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SUBJECT INDEX.

PAGE

I. The Motion 1

II. Brief in Support of the Motion 2

Restatement of the Case 2

No Substantial Question Is Presented 5

1. There Was No Statutory Misconstruction. 8

2. To Argue That the Commission's Cost Determination Operated to Overstate the Costs of One Party Is Not to Present to This Court a Substantial Legal Question .. 13

3. No Real Question of Adequacy of Findings, of Support by Substantial Evidence, or of Arbitrary Action Is Presented 16

Conclusion 19

TABLE OF CASES, STATUTES AND PAMPHLETS CITED.

Decisions of Courts.

PAGE

Baltimore & Ohio R. Co. v. *United States,* 298 U. S. 349 9

Boston and Maine R. Co. v. *United States,* 162 F. Supp. 289 10

Boston and Maine R. Co. v. *United States,* 358 U. S. 68 10

Illinois Commerce Commission v. *United States,* 292 U. S. 474 ..... 14, 15

New England Divisions Case, 261 U. S. 184 9

New York v. *United States,* 331 U. S. 284 ..... 13, 14

Decisions of Interstate Commerce Commission.

Divisions of Freight Rates, 148 I.C.C. 457, 156 I.C.C. 94 9

Divisions of Rates, Official and Southern Territories, 234 I.C.C. 175 9

New England Divisions Case, 62 I.C.C. 513, 66 I.C.C. 196, 126 I.C.C. 579 9

Official—Southern Divisions, 287 I.C.C. 497, 289 I.C.C. 4, 294 I.C.C. 739, 298 I.C.C. 83, 291 I.C.C. 90 9

Statute Cited.

Interstate Commerce Act:

Section 15(6), 49 U.S.C. §15(6), 41 Stat. 486 ..... 6, 8, 9

Pamphlet Cited.

Criteria in the Establishment of Freight Rate Divisions, by Jervis Langdon, Jr., 39 Cornell Law Review 213 9

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I.

THE MOTION.

Appellee, Louisville and Nashville Railroad Company (hereinafter called L. & N.), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

II.

BRIEF IN SUPPORT OF THE MOTION.

Restatement of the Case.

Appellants' statement of the case is misleading and, accordingly, a restatement thereof is necessary.

Appellants had been receiving a grossly excessive share of the revenue produced by joint freight rates on bituminous coal shipped from mines in Southeastern Kentucky and Eastern Tennessee on the lines of the appellee, L. & N., to destinations in North Carolina and South Carolina and Augusta, Georgia, via the L. & N. to Knoxville, Tennessee, thence Southern Railway Company, including in some instances three small subsidiaries of that company (hereinafter collectively called Southern or appellants).

Marked changes in the conditions surrounding the movement had taken place since the divisions of such joint rates were established some 40 years before, and these adversely affected the L. & N.'s revenue position. L. & N. sought to have Southern agree, in the light thereof, to a new basis of divisions. Southern refused to agree to any change[1] (Ex. C-12; Tr. 37-38).[2] Hence

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[1]319 I.C.C. 639, 641, 643, 644, 659 (pp. 9a, 12a, 13a, 32a). Page numbers as just shown in parentheses in this footnote, without other explanation, refer to pages of the Jurisdictional Statement and its Appendices.

[2]The exhibits and transcript referred to are those which are a part of the record made before the Interstate Commerce Commission.

L. & N. was compelled to bring the action before the Interstate Commerce Commission to correct the unfair basis of divisions then existing.

The unfair situation that existed may be illustrated by citing movements from what are designated Group 4 mines to Canton, North Carolina, where the L. & N. performed 55.4 percent of the miles of service and yet received but 42.4 percent of the joint revenue, whereas Southern, performing 44.6 percent of the miles of service, received 57.6 percent of the joint revenue (Exs. C-37 and C-178).

Again to illustrate, from Group 3 mines to Asheville, North Carolina, L. & N. received only 41.3 percent of the joint revenue for performing 51.7 percent of the miles of service, whereas Southern received 58.7 percent of the joint revenue for 48.3 percent of the miles of service (Exs. C-37 and C-177).

For the entire movement during a four-month test period, L. & N. received but 35.8 percent of the joint revenue for performing 43.6 percent of the miles of service, while Southern received 64.2 percent of such revenue for performing 56.4 percent of the miles of service (Tr. 1158 and 1964).

Comparing revenue received with out-of-pocket costs incurred by each railroad in performing its part of the joint service, the L. & N. received but 35.8 percent of the joint revenue for bearing 47.6 percent of the out-of-pocket costs, whereas Southern received 64.2 percent of the joint revenue for bearing 52.4 per-

cent of the out-of-pocket costs[3] (Tr. 1158; Ex. C-255). Thus is was that the Commission expressly found:

> "The evidence clearly demonstrates that the existing method of divisions *does not produce sufficient revenues for the L. & N. to cover its out-of-pocket costs,* the deficit shown for 1958 being $135,207. *On the other hand, those of the Southern exceed such costs by over $1 million, or by almost 30 percent.* Clearly, each carrier should at least receive sufficient revenues to reimburse it for its reasonable out-of-pocket costs in order to avoid confiscation. The present method of dividing revenues does not meet this minimal requirement." (319 I.C.C. 639, 659-660. Italics added.) (p. 32a)

The L. & N. was thus inequitably treated notwithstanding that equities rested with it as the developer of the coal territory (Tr. 36, 88), the supplier of all the cars[4] (Tr. 42), the performer of all the originating services, and the bearer of other burdens falling to the lot of the originating carrier of coal.

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[3]For each mile of line-haul service, for each interchange and for each switching movement it may be calculated Southern was receiving 39 percent more than L. & N. (Tr. 1992, 1993).

[4]Southern, without any reference to the record, or any support therein, improperly asserts that the cars used were predominantly of an "obsolete" character (p. 6). The record not only does not support this representation but, to the contrary, shows that at the time of the hearing the L. & N. owned 31,662 hopper cars (Ex. C-43) used for the carriage of coal, of which 5,000 were new 70-ton capacity cars (Ex. C-28), and that in the course of the hearings before the Commission L. & N. acquired an additional 1700 such 70-ton capacity cars (Tr. 354). In the light of these figures and others appearing in the exhibits cited, the Commission found, at pages 648-649 of its report (319 I.C.C. 639):

> ". . . The L. & N. has upgraded its fleet to a considerable extent within recent years, with the result that average

(Footnote continued on following page)

After conducting exhaustive hearings, covering a period, in the aggregate, of seventeen days, which produced 2,441 pages of testimony and 264 exhibits, and after the consideration of elaborate briefs, the Commission found that the involved divisions of joint rates were "unjust, unreasonable and inequitable" and required a new basis of divisions to be established which would be just, reasonable and equitable (pp. 33a-36a).[5] This basis became effective on April 27, 1964, upon denial by the district court of Southern's application for a temporary restraining order and interlocutory injunction[6] pending decision of the suit on the merits. Thereafter, the three-judge district court decided, after comprehensive briefs and oral arguments, that the attack was without merit.[7]

No Substantial Question Is Presented.

Prefatory to their statement of questions presented, appellants charge that the Commission "relied solely upon the relative costs of the carrier parties to the joint rates" (p. 4). Exactly what is meant by this quoted language appears at pages 8 and 9 of the Juris-

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age per car has decreased from approximately 18 years on January 1, 1957, comparable to the nationwide average at that time, to somewhat over 13 years." (19a)

The movement on November 20, 1958, described by a Southern witness as a typical day's movement (Tr. 691, 824), indicates that the L. & N. delivered 108 cars of coal for movement to the involved destinations on that day (Ex. D-142). Of the 108 cars, 29—or 27 percent—were, at the time of movement, 70-ton hopper cars two years old or less (Exs. C-28, D-88). The ages of the other cars interchanged on November 20, 1958, do not appear of record.

[5] 319 I.C.C. 639, 660-662.

[6] 230 F. Supp. 581.

[7] 234 F. Supp. 112 (pp. 1a-4a).

dictional Statement, where Southern asserts that the Commission concluded "it need not take into account factors other than costs that Section 15(6) of the Interstate Commerce Act requires it to consider in establishing divisions" and that "the Commission decided the case solely on the basis of costs. . . ." The charge is altogether untrue. While the Commission did prescribe divisions in the light of its determination of relative costs of Southern and L. & N., it did not reach any such conclusion as that asserted by appellants nor decide the case by considering only costs. Rather, the fact is that it gave due consideration to all factors specified in Section 15(6) and to many other factors. Specifically, it took into account and gave due consideration to relative efficiency;[8] relative revenue needs;[9] relative importance to the public of the involved railroads;[10] whether such carriers were originating, intermediate or terminating carriers;[11] relative costs of their services;[12] importance of the particular traffic to the carriers involved;[13] traffic density;[14] operating conditions;[15] mileage haul;[16] the base-group differential method of dividing rates;[17] the history of the divisions involved;[18] and traffic studies.[19]

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[8]319 I.C.C. 639, 649-653 (pp. 19a-24a).
[9]Id., pp. 647-649, 659 (pp. 17a-19a, 32a).
[10]Id., pp. 657-658 (pp. 29a-30a).
[11]Id., pp. 644-646, 653-656, 658 (pp. 13a-15a, 24a-28a, 30a).
[12]Id., pp. 653-656 (pp. 24a-28a).
[13]Id., p. 658 (p. 30a).
[14]Id., p. 649 (p. 19a).
[15]Id., pp. 646-647 (p. 16a).
[16]Id., p. 643 (p. [illegible]).
[17]Id., p. 659 (p. 32a).
[18]Id., pp. 640-641 (pp. 8a-10a).
[19]Id., pp. 642-644 (pp. 10a-13a).

Appellants advanced this contention as one of its principal points before the district court. That court expressly found:

> "The Commission did not ignore the criteria set out in the foregoing statute, but, instead, carefully considered all of the requisite factors. . . ." (p. 3a)

Appellants do not numerically list this objection as one of the questions presented to this Court (pp. 4, 5), advancing it merely as an introductory and passing remark preceding and following their listing of questions presented.

With regard to the numerically listed questions,[20] even a first reading of them discloses their unsubstantiality. They relate entirely to the methods employed by the Commission in arriving at the relative costs of Southern and L. & N.

In undertaking to bring such matters within the orbit of judicial review, Southern has resorted to the course routinely followed in attacks on Commission orders, that is, to charge that the Commission exceeded its statutory authority, that it failed to make adequate findings supported by substantial evidence, and that it acted arbitrarily. The district court expressly ruled against these same contentions, and Southern has failed altogether to show that judgment to be unsound.

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[20] In the final paragraph on page 22 of the Jurisdictional Statement, Southern asserts that there are "other substantial questions that we will argue if jurisdiction is noted." This makeweight statement adds nothing to the presentation of questions in the Jurisdictional Statement. Every point advanced by appellants was shown to the district court to be unsubstantial, and was clearly so recognized in the unanimous *per curiam* opinion of the district court.

1. THERE WAS NO STATUTORY MISCONSTRUCTION.

In asserting that there are substantial questions of law presented, appellants reveal, under the heading "The Questions Presented Are Substantial" (p. 10), that the chief one upon which they rely is what they call "the proper construction of an important section of the Act" (p. 11). The subject is thereafter dealt with at page 17 of the Jurisdictional Statement, where appellants attribute something to Section 15(6) of the Interstate Commerce Act that is not in it. They assert that in "forsaking" a certain kind of comparison which they indicate is an established standard (without showing that it is either established or a standard) "in favor of some other goal," the Commission took action that Section 15(6) "does not permit." Appellants then quote from that section, but there is no forbidding language in the matter quoted nor anywhere else in Section 15(6). To the contrary, Section 15(6) requires the Commission to give due consideration, among other things, to certain specified factors in determining a case involving the division of joint rates and in prescribing new divisions.

Appellants seemingly do not understand the language they quote from Section 15(6), and manifest no familiarity with this Court's interpretation of it. The specific factor they quote, in part, is: [the Commission shall give due consideration, among other things, to] "the amount of revenue required to pay their [the involved railroads'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation. . . ."

The clause relates to the financial condition of the involved carriers and their ability to perform the function of common carriers. It is commonly spoken of as the provision which requires the Commission to consider the relative revenue needs of such carriers, and those needs are usually measured by comparative rates of return on property investment, ascertained by relating to such investment net railway operating income. *New England Divisions Case*, 62 I.C.C. 513, 520 (1921); 66 I.C.C. 196, 202 (1922); 261 U. S. 184 (1923); *Divisions of Freight Rates*, 148 I.C.C. 457, 476, 477 (1928); *B. & O.* v. *United States*, 298 U. S. 349, 359, 360 (1936); *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175, 185, 186 (1939); *Official—Southern Divisions*, 287 I.C.C. 497, 503-505 (1953). Please see also: *Criteria in the Establishment of Freight Rate Divisions*, by Jervis Langdon, Jr., 39 Cornell Law Review 213, 218 (1954).

The meaning of the clause referred to, being that which we have briefly stated, was clearly explained by this Court in *B. & O.* v. *United States, supra.* It is perfectly plain that it has no such meaning as appellants ascribe to it.

This is an excellent illustration of the correctness of the district court's observation that ". . . counsel for Southern has attempted to find questions of law where there are none" (p. 4a).

Everything appellants say about the Commission having "exceeded its statutory authority by attempting

to equalize carrier costs" (pp. 4, 5, 16 *et seq.*) proceeds from this misunderstanding of the law.

Appellants direct their criticisms of the Commission to three aspects of its costing procedures in the development of car costs (pp. 14, 15), the first being with respect to the employment of a car-day basis or, as appellants say, a "time" basis. This was necessary in order to place L. & N.'s car costs on a basis comparable to those of Southern. The necessity arose from the unusual situation existing in this case in which L. & N. supplies all the cars for the movement, Southern simply paying car rental on the established per diem basis (Tr. 1939). Such procedure was wholly proper and resulted in no inflation in L. & N.'s costs.

Boston and Maine R. Co. v. *United States,* 162 F. Supp. 289 (D. Mass. 1958), dismissed on appeal without prejudice, 358 U. S. 68 (1958), cited by appellants, does not support their position. That case was in no way concerned with divisions of freight rates but rather with per diem or car rental charges. But passing that factual difference, we point out that the Court did not hold that it was improper for the Commission to establish car rental rates on a time basis, but that the Commission should not reject, without adequate consideration, any suggested basis of car rental rates reflecting mileage as well as time. The Commission did not here reject, without adequate consideration, the idea of car costs based on mileage as well as time. This matter was considered at great length in the recommended report of the hearing examiner, at pages 44, 46-48 and 51-53. The examiner found that "mileage

separation of the L. & N.'s expenses causes severe penalties to that road when compared with the Southern's car costs computed on a per diem basis" (Examiner's Recommended Report, p. 52). He arrived at the ultimate finding, on page 53, that "the most equitable cost proportions" are those based upon "the L. & N.'s car costs on a car-day basis at the reproduction level and with the Southern's car costs on the per diem basis." These findings were adopted in the Commission's report "in all material respects."[21]

The second criticism is that original costs rather than reproduction costs should have been used in determining L. & N.'s car costs. Depreciation based on original costs for L. & N. would have been unrealistic in this case, because the car costs of Southern were based upon reproduction. Furthermore, car costs which provide only for depreciation on the original costs of the cars, would not reflect their true economic value. The deflation in the value of the dollar would clearly render the use of original costs for L. & N. cars improper. Depreciation based on original costs would not be sufficient for the L. & N. to replace even one-half of the cars used in the movement (Ex. C-43-A; Tr. 354). That this cannot be just or right is apparent.

The third criticism, that the Commission should have reduced L. & N. costs by a substantial portion of the per diem payments made by Southern, is patently unsound. Here again appellants confuse divisions of revenues from joint rates with per diem or car rental.

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[21] 319 I.C.C. 639, 653 (p. 24a).

These are altogether different things. Per diem is purely rental paid for equipment furnished by L. & N. and used by Southern. This is exactly the same in character as rental paid by any railroad for use of the facilities of another. It may be illustrated by the fact that L. & N. would receive per diem on a car used by Southern, in a movement in which L. & N. had not participated. It is obvious that L. & N. would receive no division in such instances, yet the full rental for its cars must be paid by the using line. To treat any portion of the car rental received as a part of the divisions would be completely foreign to the function of fixing of divisions, economically unsound and productive of chaotic results.[22] The Commission recognized the unsoundness of the position in rejecting it, and this technical issue is one solely for the Commission to determine.

Finally, it is not correct to say, as appellants do, that the Commission attempted to equalize carrier costs. Appellants deal with only one element of costs, car costs, and the Commission did not begin to equalize even car costs. It allowed Southern $2.75 per day, and L. & N. $1.78 as their respective car costs.

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[22]To accept Southern's thesis as correct would mean that all divisions on all traffic throughout the United States should be changed day-by-day and car-by-car on each of the thousands of daily shipments, depending on ownership and value of the car used for each individual movement. This would be an impossibility.

2. TO ARGUE THAT THE COMMISSION'S COST DETERMINATION OPERATED TO OVERSTATE THE COSTS OF ONE PARTY IS NOT TO PRESENT TO THIS COURT A SUBSTANTIAL LEGAL QUESTION.

Notwithstanding the substantial difference, favoring Southern, between the car costs of the parties as determined by the Commission, Southern argues that the car costs determined for the L. & N. were too high, or were "overstated" (pp. 11-13).

This is not true; but the vital question here is simply: Does this present a substantial legal question for determination by this Court? Manifestly it does not. For it is nowhere made a function of this Court to substitute its judgment for that of the Commission in cost ascertainment. The Commission is the body established to make proper cost determinations. This Court has made that perfectly plain when it said, in *New York* v. *United States,* 331 U. S. 284 (1947), at page 328:

> ". . . The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal."

In like vein, this Court also said at page 335 of the opinion in that case:

> ". . . These problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic

is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated."

And in footnote 33 to the last quoted statement, the Court quoted the following from *Hamilton, Cost as a Standard for Price,* 4 Law & Contemp. Prob., 321, 329:

"' 'Now and then a hardy soul, equipped with simple faith and a calculating machine, essays the adventure of rates based upon the true costs of particular services. The feat is, of course, technically impossible, for value judgments or empirical rules are essential to the distribution of overhead. A calculation of the real cost of transporting cotton-seed in less than carload lots from Lampassas, Texas to Kankakee, Illinois, is a stubborn exercise in imputation.' "

Again, in dealing with the matter of judicial review of costs employed by the Commission, this Court said in *Illinois Commerce Commission* v. *United States,* 292 U. S. 474 (1934), at page 481:

"Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's

> determination, it is not subject to review in the courts. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Assigned Car Cases*, 274 U. S. 564, 580."

And further, at page 484:

> ". . . Appellants reach their conclusion as to the reasonableness of the interstate rate by disregarding the cost study as evidence because, as is contended, it was erroneously considered by the Commission. But as we have already said it was for the Commission to determine whether the cost study was adequate or whether it was necessary to refine or supplement it in order to make it dependable evidence for the purpose of rate making. The study itself afforded evidence of the reasonableness of the rate fixed, and upon the whole record there was abundant support for the Commission's finding, which was carefully and thoroughly considered in its report. There is no basis upon which the courts, not authorized to weigh evidence, could reexamine or disregard its conclusion."

So it is clear to the point of being conclusive that appellants do not, in arguing to this Court that L. & N. costs were overstated by the Commission, present a substantial legal question for this Court's determination.

3. NO REAL QUESTION OF ADEQUACY OF FINDINGS, OF SUPPORT BY SUBSTANTIAL EVIDENCE, OR OF ARBITRARY ACTION IS PRESENTED.

Appellants undertake here and there (pp. 5, 18) to dress their contentions up in the language of legal questions when they say they present questions whether "the Commission made adequate findings supported by substantial evidence," and whether "the Commission acted arbitrarily," but there is no real question of this kind presented.

The three-judge district court expressly found:

> "Having determined comparative costs to be a factor of especial importance, the Commission then carefully considered all of the evidence relating to costs, determined the fully distributed costs of each carrier, and adjusted the division of rates accordingly. The ultimate facts found are supported by substantial evidence." (p. 3a).

Appellants do not show otherwise. They do assert that the Commission "accepted the L. & N.'s cost figures in gross" (p. 14), but this is untrue. Actually, L. & N. offered three separate bases for computing its car costs. Furthermore, the impression sought to be left that the Commission considered only the costs developed by L. & N. is equally false.

Southern itself developed the first cost study offered in evidence, presenting it as reflecting only its expenses. That study was not computed in accordance with the formula which Southern now insists is the only proper basis for ascertaining such costs.

Based thereon Southern asked for what it called a "conservative" increase of 53 percent in its divisions (Tr. 738). Since Southern was already receiving 64.32 percent of the revenue (p. 28a), a 53 percent increase would have given it 98.3 percent of the total revenue and would have left the L. & N. with only 1.7 percent.

A detailed analysis of that so-called cost study was made on behalf of L. & N. by the man who created the Commission's formula to which Southern refers, and reworked by him to remove the effects of major errors and fundamental misconceptions in costing procedures, exaggerated by duplication of certain expense items, which revealed an overstatement in Southern's costs of more than $81 per car, or 71 percent (Tr. 1122-1126). The L. & N. thereafter made a study of L. & N.'s costs on a basis comparable to the corrected costs of Southern.

Southern then made a second cost study containing many of the same monstrous flaws of its initial study. Southern's second study required extensive correction by the L. & N., and led to the L. & N.'s second study.

The hearing examiner discussed the cost studies at great length (I.C.C. Examiner's Recommended Report, pp. 32-44), and found that Southern's second study had such deficiencies as precluded its use as "a basis for fixing the divisions in the involved Knoxville coal traffic". (I.C.C. Examiner's Recommended Report, p. 51). The Commission, which adopted "the examiner's findings concerning costs in all material respects" (p. 24a), also found that a restatement of costs made by Southern in its exceptions to the exam-

iner's recommended report had "in it the same basic deficiencies as found in defendants' earlier cost studies" (p. 27a). This led to acceptance by the Commission of L. & N.'s restatement of Southern's cost showings as depicting the relative costs of the carriers in handling this traffic (p. 30a), such costs being found to be "reasonable and sufficiently reliable for the purposes of this case" (p. 24a).

Similarly, Southern's contentions before this Court about what are proper cost procedures and what are not will not stand the test of scrutiny; but we refrain from showing this in detail because, as we have shown, they present no substantial legal question for this Court—indeed no legal question at all, substantial or otherwise.

This Court will, therefore, fully appreciate why the district court concluded: "[C]ounsel for Southern has attempted to find questions of law where there are none" (p. 4a).

CONCLUSION.

Since the appellants present no substantial question for the decision of this Court, the final judgment of the district court should be affirmed.

Respectfully submitted,

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